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Hillman (1892) 145 U. S. 285; *Jacobs v. Whitman* (1852) 10 Cush. 255; and whether regarded as entirely outside the hearsay rule, *McKelvey*, Evidence, § 140, or within one of its exceptions, 1 Greenleaf, 16th ed. §§ 162a, 162c, they should be admitted. 1 Wigmore, Treatise on Evidence, §§ 113, 143, 144. As pointed out in *Insurance Co. v. Moseley* (1869) 8 Wall. 397, "whenever the bodily or mental feelings of an individual are material to be proved, the usual expressions of such feelings are original and competent evidence * * * Such declarations are regarded as acts and are as competent as any other testimony when relevant to the issue. Their truth or falsity is an enquiry for the jury." Expressly overruling an earlier case, *Com. v. Felch* (1882) 132 Mass. 22, on the authority of which *Siebert v. People*, supra, was decided, this view was adopted in a leading Massachusetts case, and expressions showing a suicidal intention were admitted. *Com. v. Trefethen*, supra.

In a recent Connecticut case the court admitted such evidence but it failed to agree with the Ohio court as to what declarations might be shown. *Blackburn v. State* (1872) 23 Ohio St. 146; *State v. Kelly* (Conn. 1904) 58 Atl. 705. This is a question of relevancy. In the Connecticut case the defendant, on trial for the murder of his wife, offered to show by her declarations a plan to commit suicide. The court, appearing to work on the theory that the existence of a plan or design could be shown only by declarations made just before or at the moment of the act, excluded, as too remote, all evidence made more than two months prior, and so, though denying it in terms, really made time the test of admissibility. But the intention to commit suicide might be of so long standing as to amount to a suicidal mania, and the excluded expressions might best establish it. Such a plan would be relevant evidence. 1 Wigmore Treatise on Evidence § 102. Of course, if the declarations are to establish the ultimate fact, or are introduced with some evidential fact, as part of the *res gesta*, 2 Bishop Crim. Proced. §§ 626, 627, time may be vital, 3 COLUMBIA LAW REVIEW 351, but in dealing with declarations showing a plan or design time alone has little or no value. *State v. Adams* (1882) 76 Mo. 358. The courts have admitted threats made from one to nine years before the crime charged was committed, *Abbott v. Com.* (Ky. 1902) 68 S. W. 124; *Com. v. Holmes* (1892) 157 Mass. 233, and mere statements, not threats, made three years prior to the act, have been allowed. *Com. v. Robinson* (1888) 146 Mass. 571. So, while the exclusion of such declarations must be left to the sound discretion of the court; *Com. v. Trefethen*, supra; *Com. v. Holmes*, supra; the exclusion should be made with the understanding that lapse of time goes only to the weight and not to the relevancy of the evidence. *State v. Bradley* (1892) 64 Vt. 466; *Redd v. State* (1881) 68 Ala. 492. This was the holding as to suicidal declarations in the *Blackburn* case, and in so far as the Connecticut court overlooks this principle, its decision seems unsound.

IMPLIED CONTRACTS IN ASSUMPTION OF RISK.—The general doctrine is almost universally recognized in England and the United States that upon contracting for service a servant assumes all ordinary risks incident to the business and all risks arising from the negligence of his fellow servants. In a recent damage case the Supreme Court

of New York declared that "this assumption of risk by an employee rests upon contract, expressed or implied, and it can only be removed or eliminated by like contract," and the conception is of frequent occurrence in the decisions. *Hempstock v. Lackawanna Iron & Steel Co.* (1904) 90 N. Y. Supp. 663.

Both the English and the American decisions upholding this view trace its origin to Chief Justice SHAW, who, in *Farwell v. B. & W. R.* (1842) 4 Met. 49, upon considerations of justice and general convenience held that there is an implied promise on the part of an employee to undertake all such risks and perils. While this theory may be convenient as a working rule, its application leads to great confusion of thought and anomalous conclusions. It is a very loose use of words to say that such rights and obligations imposed by law rest upon a contractual basis, when, as a matter of fact, there may be an utter lack of mutuality, incapacity to contract, or a want of consideration. Thus a servant is held to have assumed the risks of service when in reality she had no knowledge of machinery and did not actually appreciate the dangers. *Ruchinsky v. French* (1897) 168 Mass. 68. An infant cannot make a binding contract for services, yet, while in the employment of another he is held by legal implication to have undertaken all risks incident to the service. *Gaffney v. Hayden* (1872) 110 Mass. 137; *Taylor v. Wootan* (1890) 1 Ind. App. 188. A married woman may likewise become a servant, assuming the usual risks, and both married women and infants may become masters, although a married woman's contract is void. Dresser, Employer's Liability §§ 10, 11, 82. A volunteer who comes to the assistance of a servant in a particular emergency cannot recover from the master for an injury caused by the negligence or misconduct of such servant because he has assumed the risk. *Osborne v. K. & L. R.* (1877) 68 Me. 49. An express messenger, in no way known to the railroad company save that he was riding in a car furnished by them under a contract with the express company, was held to be in a position analogous to that of an employee of the railroad, and therefore to have assumed the risk of injury through the negligence of the servants of the railroad. *C. & N. W. R. v. O'Brien* (1904) 132 Fed. 593. To place such a decision upon the basis of an implied contract by the messenger with the railroad is to stretch legal implication to an extent not warranted by the facts. Furthermore, the remedy allowed for a breach of the correlative duty of the master to provide a safe place to work, proper tools and machinery, competent fellow servants, and adequate rules and regulations is an action *ex delicto*, and not compensation for breach of contract.

The duties imposed by this doctrine of the servant's assumption of risk can neither be explained nor enforced upon any contractual basis without doing violence to the elementary principles of contract. They cannot be called contracts implied in fact, nor do they fall within any of the well recognized principles of quasi-contracts. See Keener, Quasi-Contracts, Ch. 1. It would seem more accurate to treat them as a body of law incidental to the status or relationship of master and servant. They are rights and obligations imposed by law, and bear a certain analogy to the common law duty owed by a common carrier to a passenger, discussed in 5 COLUMBIA LAW REVIEW 53.